With all due respect to Datuk Suppiah who appeared on behalf of the appellants I do not think that there is merit in this appeal, since the law is that the court will not intervene in matters relating to military law prescribing rules for the guidance of officers. It was so held in *The King* v. *the Army Council, Ex parte Ravenscroft.*[1] By regulations made under section 70 of the Army Act in the United Kingdom for holding military courts of inquiry, it is provided that previous notice should be given of the time and place of the meeting of a court of inquiry, and of all adjournments of that court, to all persons concerned in the inquiry; and that whenever an inquiry affects the character or military reputation of an officer, full opportunity must be afforded to the officer of being present throughout the inquiry. An officer whose conduct was brought before a court of inquiry by the order of a general officer in command, complained that the above regulations had not been complied with, and that as the result of evidence given before the court he had been ordered by the Army Council to revert to half-pay. He applied to the Army Council, who refused to reopen the matter. He applied for mandamus to command the Army Council to cause the court of inquiry to reassemble to hear and determine the case according to law. His application was rejected by the Divisional Court. Viscount Reading C.J. at pages 509, 510 and 511 said:

"It is to be observed that the complaint of the [applicant] before this court is that he had no notice of the reassembly of the court of inquiry, and therefore no opportunity of cross-examining the witnesses and giving his own explanation. These matters would be very relevant if we were considering the procedure of a civil court. He relies on the Regulations for Courts of Inquiry which, as he says, have been infringed.

... It appears to me that this is a military matter. The [applicant] was under military law. His complaint, if any, is against his superior officer who directed the convening of the court of inquiry and the officer who in his view wronged him by not giving him a proper opportunity of presenting himself on the last two occasions when the court of inquiry met."

The learned Chief Justice dismissed the application because of the general principle which he stated earlier on during his judgment at page 508:

"... I have no doubt that this court has no power to interfere with matters of military conduct and purely military law affecting military rules for the guidance of officers or discipline generally."

In *R.* v. *Secretary of State for War, Ex parte Martyn*[2] the Divisional Court said that the court could only interfere with military courts and matters of military law in so far as the civil rights of a soldier might be affected, and, therefore, if a court martial had not been convened in accordance with the Rules of Procedure the court had no jurisdiction to interfere. Lord Goddard C.J. said at page 243:

"If the court martial in the present case has not observed the proper rules of procedure, that is a matter for the convening officer, and, if necessary, the Judge Advocate General to deal with, but it is not a matter for this court, which can only interfere with military courts and matters of military law in so far as the civil rights of the soldier or other person with whom they deal may be affected. This application really amounts to asking us to decide that the members of the court martial were wrong in holding that they had been convened in accordance with the Rules of Procedure, but that is purely a matter of military law and procedure and not one to interfere with which this court has any jurisdiction."

I would therefore dismiss this appeal, with costs. The appellants' deposit to be paid to the respondents against their taxed costs.

Raja Azlan Shah and **Wan Suleiman F.JJ.** concurred.

Appeal dismissed.

Solicitors: *Suppiah & Singh.*

ALAGAPPA CHETTIAR v. FREEDAM SHAH BIN CHE YEAM

[F.C. (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) June 3, 1977]

[Alor Star — Federal Court Civil Appeal No. 51 of 1976]

Land Law — Charge to moneylender — Memorandum of Agreement — Memorandum of charge — Whether memorandum of agreement a promissory note — Application for sale — Payment of interest — Stamp Ordinance, 1949, ss. 2, 41, 47 and 52 — Moneylenders Ordinance, 1951, s. 16 — National Land Code, s. 256.

Stamp — Promissory note — Stamp Ordinance, 1949, ss. 2, 41, 47 and 52.

The respondent had charged his shares in certain land to the appellant as security for a loan. The appellant was a moneylender and a memorandum of agreement and a memorandum of charge were executed. On failure of the respondent to pay the appellant applied for order of sale. The main grounds of objection raised were (1) that no authenticated copy of the memorandum of agreement was given to the respondent as required under section 16 of the Moneylenders Ordinance, 1951; (2) that the claim was statute-barred by the Limitation Ordinance 1953; (3) that the memorandum or agreement was not duly stamped as required by section 41 of the Stamp Ordinance, 1949.

The learned trial judge rejected the first objection as he held that as the respondent had acknowledged receipt of a copy of the memorandum authenticated by the borrower the onus was on him to rebut the presumption and he had failed to do so. The learned trial judge also rejected the second contention as he held that the period of limitation to recover money on a charge was twelve years. He held however that the memorandum of agreement was a promissory note and as it was not duly stamped before execution it was not admissible in evidence. He also held that the charge did not appear to have been signed by the appellant at the time of execution and the memorandum of charge did not specifically provide for interest after the day appointed for repayment. He therefore dismissed the appellant's claim. The appellant appealed.

Held, allowing the appeal: (1) the memorandum of agreement was not a promissory note and therefore was not required to be stamped before execution to be admissible;

(2) the memorandum of agreement and the memorandum of charge must be taken together and there was no omission to state the date of the loan;

(3) the charge was in fact executed by the appellant at the time of the execution;

(4) although the charge did not provide for interest after the date appointed for repayment, there was a clear provision to that effect in the memorandum of agreement.

Cases referred to:-

(1) *Boor Singh* v. *Abdul Majeed* [1967] 1 M.L.J. 16.

(2) *Abirami Ammal & Anor.* v. *M.S.M.M. Meyappa Chettiar* [1959] M.L.J. 149.

(3) *Mortgage Insurance Corporation Ltd.* v. *Commissioners of Inland Revenue* (1888) 21 Q.B.D. 352, 357, 358.

(4) *Brown Shipley & Co.* v. *Commissioners of Inland Revenue* [1895] 2 Q.B.D. 598.

(5) *Arumugam* v. *Leonard* [1936] M.L.J. 252.

(6) *Suchait Singh* v. *Shir Ali Khan* [1939] M.L.J. 28.

FEDERAL COURT.

A. Jayadeva for the appellant.

S. Visvanathan for the respondent.

Gill C.J. (Malaya): This is an appeal from the dismissal by Syed Agil Barakbah J. of the appellant's application under section 256 of the National Land Code for an order for the sale of the respondent's undivided shares in six pieces of land which were charged to the appellant as security for the repayment of a loan of $15,000 granted by him as a licensed moneylender to the respondent. The loan was made and the charge executed on April 1, 1964. On the same day before the loan was given the appellant and the respondent executed a Memorandum of Agreement setting out the terms and conditions of the loan and its repayment and of the charge.

Clauses 2 and 4 of the Memorandum of Agreement provided as follows: —

"2. The Borrower agrees with the Lender that the Borrower will on the 1st day of February, 1965 repay to the Lender the said principal sum of Dollars Fifteen thousand (15,000) and will in the meantime and thereafter so long as the abovementioned principal sum or any part thereof remains owing pay interest thereon or on the unpaid part thereof at the rate of $1 per $100 per mensem by equal monthly payments to be made on the 1st day of every month, the first of such monthly payments to be made on the 1st day of March, 1964.

4. The loan hereby agreed to be made is intended to be a loan on charge of the immoveable property described in the Schedule to the Charge and it is one of the terms and conditions of this Agreement and of the loan hereby agreed to be made that the parties hereto be respectively bound by and have the benefit of all the covenants and provisions expressed or implied by law in the Charge so agreed to be executed by the Borrower as aforesaid."

In the memorandum of charge it was stated that the respondent agreed to pay the principal sum together with interest thereon at the agreed rate within one year from the date of the memorandum.

The application for sale was made to the High Court at Alor Star by way of Originating Summons dated the 17th day of February 1975. It was supported by the affidavit of RM. M. Natarajan Chettiar s/o Muthiah Chettiar, the duly constituted attorney of the applicant. Briefly, the facts set out in the affidavit are as follows. A duplicate copy of the memorandum of agreement duly authenticated by the former attorney of the appellant was delivered to the respondent who acknowledged receipt thereof. The respondent paid interest amounting to $4,650 up to August 31, 1966, but thereafter failed to pay the principal sum of $15,000 and the sum of $14,850 being the arrears of interest due up to December 1, 1974. On October 31, 1974 a notice of demand in Form 16E of the National Land Code for repayment of the amount due on the charge was served on the respondent, but the respondent failed to comply with it.

The respondent filed an affidavit in reply setting out a number of grounds both legal and factual on which he resisted the appellant's application. A large number of such factual objections were rejected by the learned judge, and as there is no cross-appeal in relation to such rejection I do not consider it necessary to deal with them. Suffice it to say that the learned judge apparently found no substance in the respondent's allegation that he was only a nominal borrower and that the loan was in fact made to one Goh Kim Heang, who subsequently executed an agreement promising to repay the loan taken on his behalf.

The main grounds of objection on which the respondent relied and which are dealt with by the learned judge in his judgment were:

(1) that no authenticated copy of the memorandum of agreement was ever given to him as required under section 16 of the Moneylenders Ordinance, 1951,

(2) that the claim was statute-barred by the Limitation Ordinance, 1953, and

(3) that the memorandum of agreement was not duly stamped as required by section 41 of the Stamp Ordinance, 1949.

The learned judge rejected the first objection on grounds which are stated in his judgment as follows: —

"Regarding issue (1), section 16 of the Moneylenders Ordinance requires, *inter alia*, that a copy of the note or Memorandum in writing authenticated by the Lender or his agent must be given to the borrower before the money is lent. The Memorandum is made pursuant to the Moneylenders Ordinance. It contains all the terms of agreement and the particulars required under sub-section (3) of section 16. It also expressed the intention of the parties to execute a charge under the Kedah Land Enactment (then in force) as security for the loan and to be bound by the relevant provisions of the Enactment relating to the charge. A scrutiny of the relevant documents clearly shows the original memorandum was never authenticated by the Applicant who has not put his signature to the relevant part at the foot of the Memorandum, dated February 1, 1964. There is, however, the acknowledgment by the Respondent of having received a copy thereof authenticated by the Applicant. Because of this the onus falls on him to rebut the presumption. (See *Boor Singh v. Abdul Majeed*[1]). There was a bare denial on his part as against the Applicant and his witness who testified to the contrary. The Respondent ought to have produced the copy or called Goh Kim Heang who he said had received the copy, to rebut the presumption. On the face of the original unauthenticated memorandum alone, it is not sufficient to presume in the absence of evidence to the contrary that the copy thereof was not authenticated by the lender and not received by the borrower. Nevertheless, the effect of section 52 of the Stamp Ordinance, 1949, which is dealt with below, relating to the failure to have the memorandum of loan stamped under section 41 thereof, seems to indicate that the copy thereof, being a 'promissory note' as defined in section 2 should not have been authenticated. In the result it cannot be regarded as an authenticated copy, even if it was received by the Respondent in his capacity as the borrower."

I agree with respect with the learned judge's rejection of the first objection. It is to be observed that the learned judge while dealing with this first objection gave an indication of what his answer was going to be in relation to the third objection.

With regard to the second objection the answer was fairly simple. Having observed that the Moneylenders Ordinance treats the contract and the security in respect of it as separate and distinct things (per Thomson C.J. (as he then was) in *Abirami Ammal & Anor.* v. *M.S.M.M. Meyappa Chettiar*[2]) the learned judge went on to state as follows: —

"Under section 21 of the Limitation Ordinance the period of limitation to recover money on a charge is twelve years from the date when the right to receive money accrued. The Respondent's objection in this regard therefore fails."

The third issue raised in the objection referred to non-compliance with section 41 of the Stamp Ordinance, 1949, which necessarily involves sections 47 and 52 thereof. The accepted interpretation of those three sections is that a promissory note which is not duly stamped before or at the time of the execution is not admissible in evidence; nor can it be acted upon, registered or authenticated.

In dealing with this objection the learned judge asked himself the question whether the memorandum of agreement was a promissory note. In this connection he took into consideration the definition of a promissory note in section 2 of the Stamp Ordinance, and then considered the cases of *Mortgage Insurance Corporation Ltd.* v. *Commissioners of Inland Revenue,*[3] and *Brown Shipley & Co.* v. *Commissioners of Inland Revenue.*[4] In the former case it was held that in order that a document may be a promissory note within section 49 of the Stamp Act, 1870, it must substantially contain a promise to pay a definite sum of money and nothing more, and that a document containing a promise to pay money as part of a contract containing other stipulations would not be a promissory note within the Act. In the latter case it was held that an instrument issued by an American Company as security for a temporary loan secured by the deposit of gold bonds by way of collateral security was not a mere promissory note, and that it was required to be stamped as a "marketable security" within the meaning of sections 92 and 122 of the Stamp Act, 1891.

The result at which the learned judge arrived after considering the above authorities is stated in his judgment as follows: —

"In the present case, the memorandum also falls into two parts, viz. a promise to pay $15,000 with interest as stipulated for a period of twelve months after which the principal becomes due and, secondly, a condition of charging the land as security for payment of the principal, i.e. a definite sum. In my considered judgment, therefore, the memorandum is a promissory note within the meaning of section 2 of the Stamp Ordinance. Since it was stamped about twenty days after its execution, as admitted by the Applicant and evidenced by the stamping date, it is not admissible in evidence nor can it be acted upon, registered, or authenticated by virtue of section 52."

With respect to the learned judge the memorandum of agreement was nothing more than what it was stated to be. I cannot see how it can possibly be treated as a promissory note when it is quite clear that the parties were merely setting out therein the terms of the loan and there was mention therein of a charge to be executed by the respondent over his undivided shares in six pieces of land in Alor Star. Assuming that it was a document in the nature of a promissory note, it contained other stipulations such as the execution of a charge. In my judgment the learned judge's conclusion was in direct contradiction of the authorities on which he was relying for that conclusion.

Having disposed of the third objection in the way stated above, the learned judge observed that the only document left to be considered seemed to be the memorandum of charge. In considering the position of the charge in this case by itself in the light of the decision in *Abirami Ammal & Anor.* v. *M.S.M.M. Meyappa Chettiar*[2] in which the charge was held to be unenforceable on the ground that the date of the loan was not stated therein as required by section 16(3) of the Moneylenders Ordinance, the learned judge arrived at the following conclusion as set out in his judgment:

"In the present case, as the memorandum is held to be inadmissible in evidence and not to be acted on it seems to fall on all fours with the principles cited above i.e. the memorandum of loan should be treated as non-existent. Similarly, the present charge has all the requirements of subsection (3) of section 16 but with regard to the date it merely says 'the applicant will pay the principal and interest at $1 for every $100 for every month to be settled within one year from the date of this letter.' The date of the execution of the charge was written as February 1, 1964. Although the words 'this letter' refers to the charge, it has failed to show the date of the loan 'separately and distinctly' as required under section 16(3). It may well be construed by implication and perhaps supported from evidence or by the cheque which was for the sum of $15,018.75 issued and signed by the Applicant, but they are evidence aliunde. The crux of the matter is the requirement of paragraph (a) of sub-section (3) and nothing else. I therefore hold the omission to state the date of loan is fatal to the charge being treated as a memorandum of loan."

I am constrained to say that I find myself unable to agree with the learned judge's conclusion. As I have already said, the memorandum of agreement was not a promissory note. It was clearly a note or memorandum in writing of the contract to be signed by the parties to the contract within the meaning of section 16 of the Moneylenders Ordinance. The Memorandum of Agreement clearly stipulated that the lender had agreed to lend the money to the borrower on the 1st day of February 1964, and it stated the amount of the principal sum to be lent and the rate of interest as required under section 16(3) of the said Ordinance. The agreement further stipulated that the borrower, as security for his obligations under the agreement, was to execute a Memorandum of Charge and the charge itself was executed on the 1st of February 1964. This is clear not only on the face of the charge but from the certificate of attestation dated the same date by the Land Officer, Kota Setar. It would therefore seem clear that there was no omission to state the date of the loan, especially when the memorandum of agreement and the memorandum of charge are taken together.

The next point which the learned judge took, although it was not raised by the respondent, was that the charge itself did not appear to have been signed by the appellant at the time of execution. In this regard the learned judge has this to say in his judgment:

"Under the clause where the chargee states he accepts the charge with the terms and conditions as stated above; the signature of the witness, Kasi Chettiar, appears as the chargee instead of the Applicant who signed on the top of his name. No doubt the charge is written in Jawi script but the attestation was done by the Assistant Land Officer, a Malay, who must have made sure in the circumstances that the parties and witnesses understood the contents before putting their respective signatures at the proper places."

I regret to have to say that the learned judge would appear to have failed to scrutinise the memorandum of charge carefully. Kasi Chettiar's name appears above the words "Signature of Witness" in Jawi. Moreover the attestation clause by the Land Officer states that Kasi Chettiar was a witness to the signature

of the chargee. The signature of Muthuraman Chettiar s/o Yegappa Chettiar as attorney appears above the words "Signature of the Chargee" in Jawi. The whole thing is clear from the English translation of the charge which was never questioned. It was contended by counsel for the respondent that there was no ground of appeal in relation to the learned judge's finding that the charge was not signed by the appellant at the time of execution. In my opinion, it was not necessary to raise a ground of appeal in respect of something which is obvious on the face of the charge itself.

The learned judge lastly held that as the memorandum of charge did not specifically provide for interest after the day appointed for repayment of the loan, no interest was payable after such date. (See Das on the "Torrens System in Malaya" page 44; *Arumugam* v. *Leonard*[5] and *Suchait Singh* v. *Shir Ali Khan*[6]). He further held that the statement of accounts furnished by the appellant as regards the amount of interest which had already been paid by the respondent should be re-opened under section 21(2) of the Moneylenders Ordinance and examined by the Assistant Registrar of the court on a date to be fixed.

It is true that the charge itself did not provide for interest after the date appointed for repayment, but there was a clear provision for it in clause 2 of the memorandum of agreement. As I have already said, the memorandum of agreement and the memorandum of charge must be read together. I am therefore of the opinion that interest was payable after the date appointed for repayment, subject to the limitation set out in section 21(5) of the Limitation Ordinance, 1953 which provides that no action to recover arrears of interest payable in respect of any money secured by a charge shall be brought after the expiration of 6 years from the date from which the interest became due. I understand this provision to mean that the appellant cannot claim more that 6 years' interest which at the rate agreed comes to $10,800 of which a sum of $4,650 has been paid by the respondent leaving a balance of $6,150.

For reasons I have stated I would allow the appeal, set aside the order of the learned judge and make an order for the sale of the charged lands for the recovery of the sum of $21,150 as being the amount due on the charge. There will be a further order as required under section 257 of the Land Code that the sale do take place on a suitable date after June 30, 1977. The respondent must pay the costs of this appeal and costs in the court below. The deposit will be refunded to the appellant.

Ong Hock Sim F.J. and **Raja Azlan Shah F.J.** concurred.

Appeal allowed.

Solicitors: *Jayadeva & Zahir; Visva & Co.*

I.C.I. CHEMICAL DISTRIBUTORS (M) SDN. BHD. v. DIRECTOR-GENERAL OF INLAND REVENUE

[F.C. (Ali, Raja Azlan Shah and Wan Suleiman F.JJ.) June 7, 1977]

[Kuala Lumpur — Federal Court Civil Appeal No. 24 of 1976]

Revenue Law — Income Tax — Malaysian Company with business also in Singapore — Cessation of business of company in Singapore — Income tax paid under cessation provisions in Singapore — Whether company liable for tax in Malaysia — Double Taxation Relief (Republic of Singapore) Order, 1966 — Double Taxation Relief (Republic of Singapore) Order, 1968 — Income Tax Act, 1967.

The appellant in this case was a Malaysian company which also carried on business in Singapore. The Company ceased its Singapore business on December 31, 1968. On cessation of the business in Singapore, the cessation provisions as contained in the Singapore Income Tax Ordinance were applied and the appellant was assessed to the Singapore income tax for the year of assessment 1968 on the income for that year ending December 31, 1968 instead of on 1967 income only. The financial year of the company in Malaysia ended on September 30th and the company was assessed on the Singapore income of $293,237 from October 1, 1967 to September 30, 1968 for the year of assessment 1969 and for the Singapore income of $109,886 from October 1, 1968 to December 31, 1968 for the year of assessment 1970. They appealed to the Special Commissioners of Income Tax who held that the appellants had acquired a right to exemption under the 1966 agreement, which had not and could not be taken away from them. On appeal by way of case stated to the High Court, the learned judge held that the 1966 agreement as amended only enabled the appellant to escape double taxation up to and including the year of assessment 1968. He therefore held that appellant was liable for tax in Malaysia for the years of assessment 1969 and 1970. The appellant appealed.

Held: (1) it was clear on the interpretation of the double-tax agreements that any right to be exempted from double taxation (or to be given credit for tax paid) ceased after the year of assessment, 1968 and the Double Tax agreement of 1968 did not apply;

(2) similarly there could be no extension of the right to bilateral credit as the Double Tax Agreement of 1966 was limited to the last day of the year of assessment 1968 and the provisions of the 1968 agreement could not apply to the company.

[Editorial Note: In view of the demise of Ali F.J., the court asked both counsel for the parties under section 42 of the Courts of Judicature Act, 1964 whether they consented to accept judgments by the remaining judges of the court, it being understood that if there was no majority opinion the proceedings should be re-heard. Both counsel consented.]

Cases referred to:-

(1) *Partington* v. *Attorney-General* L.R. 4 H.L. 100, 122.

(2) *Brown* v. *National Provident Institution* 8 T.C. 57.

(3) *Whelan* v. *Henning* 10 T.C. 263.

FEDERAL COURT.

S. Woodhull for the appellants.

Bakaruddin bin Suleiman (Senior Federal Counsel) for the respondent.

Wan Suleiman F.J.: This is an appeal from the decision of Azmi J. The judge had allowed the appeal by way of Case Stated by the Special Commissioners of Income Tax under paragraph 34 of Schedule 5 of the Income Tax Act, 1967 at the instance of the Director-General of Inland Revenue.

The facts of the case as admitted or proved are set out in the judgment of the learned judge the relevant portion of which I set out hereunder: